

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

In re:  
MARTIN HOWSER,  
v.  
UNITED STATES

No. CV-09-0228-FVS

ORDER GRANTING UNITED STATES  
TRUSTEE'S MOTION TO DISMISS

**THIS MATTER** comes before the Court on appeal from the United States Bankruptcy Court for the Eastern District of Washington. Martin Howser appeals an order from the Bankruptcy Court denying employment of counsel in his ch. 11 bankruptcy proceeding. (Ct. Rec. 7 at 2). Currently before the Court is the U.S. Trustee's motion to dismiss this appeal for lack of jurisdiction. Mr. Howser is represented by John Bury and Timothy Fischer. The U.S. Trustee is represented by Gary W. Dyer.

## BACKGROUND

On April 29, 2009, Mr. Howser filed a voluntary ch. 11 bankruptcy petition in Bankruptcy Court for the Eastern District of Washington. (Ct. Rec. 9). On May 5, 2009, he filed an application for approval of Timothy Fischer as his attorney. (Ct. Rec. 9). The Bankruptcy Court initially granted the application on June 3, 2009. (Ct. Rec. 9). On June 9, 2009, the U.S. Trustee ("Trustee") moved for reconsideration

1 of the employment because Fischer's firm failed to disclose its  
2 representation of Mr. Howser's wife in a state court case. (Ct. Rec.  
3 9). On July 20, 2009, the Bankruptcy Court entered an order granting  
4 the Trustee's motion to reconsider and denying the employment of Mr.  
5 Fischer due to the conflict of interest. (Ct. Rec. 7).

6 On July 27, 2009, Mr. Howser filed a notice of appeal in this  
7 Court, seeking reversal of the bankruptcy judge's order granting the  
8 Trustee's motion to reconsider and denying the employment of Mr.  
9 Fischer as counsel. (Ct. Rec. 1). On July 29, Mr. Howser moved in  
10 Bankruptcy Court to convert his ch. 11 reorganization to ch. 7  
11 liquidation. (Ct. Rec. 7). Mr. Howser's motion to convert was granted  
12 the same day. (Ct. Rec. 7). Mr. Howser then filed a motion to  
13 voluntarily dismiss his ch. 7 proceeding on November 3, 2009, which was  
14 granted by the Bankruptcy Court. (Ct. Rec. 9). Currently, Mr. Howser  
15 is not involved in any active bankruptcy proceeding.

16 On October 13, 2009, the Trustee filed this notice of motion and  
17 motion to dismiss Mr. Howser's appeal. (Ct. Rec. 6). The Trustee's  
18 argument for dismissal is two-fold. First, since the ch. 11 case was  
19 voluntarily converted to ch. 7, any appeal from an order entered in the  
20 ch. 11 proceeding is moot. (Ct. Rec. 6). Second, the Trustee argues  
21 that an order denying employment is interlocutory, and that this Court  
22 lacks jurisdiction under 28 U.S.C. § 158(a)(1) to review an order that  
23 is not "final and appealable." (Ct. Rec. 6). Mr. Howser's opposition  
24 is grounded in an alleged consolidation of this appeal with an appeal  
25 from an order denying his attorney compensation, arguing that this  
26 "cures" the jurisdictional defect. (Ct. Rec. 9 at 4).

1       **DISCUSSION**2       **A.    The Mootness Doctrine**

3       The jurisdiction of federal courts is limited to actual  
4 "cases and controversies." U.S. Const. art. III, § 2, cl. 2.  
5 Generally, an "actual controversy" must exist at every stage of  
6 appellate or certiorari review. *Pub. Utils. Comm'n of California v.*  
7 *Fed. Energy Reg. Comm'n*, 100 F.3d 1451, 1458 (9<sup>th</sup> Cir. 1996) (internal  
8 quotation marks omitted). Due to this limitation, federal courts have  
9 no authority to decide a "moot" case. *Iron Arrow Honor Society v.*  
10 *Heckler*, 464 U.S. 67, 70 (1983). "[A] case becomes moot when the  
11 issues presented are no longer live or the parties lack a legally  
12 cognizable interest in the outcome." *Pub. Utils. Comm'n*, 100 F.3d at  
13 1458. If the court is unable to grant adequate relief, it lacks  
14 jurisdiction, and the case must be dismissed. *Id.* There are, however,  
15 four exceptions that will allow a federal court to assert jurisdiction  
16 over a moot case. *In re Burrell*, 415 F.3d 994, 998 (9<sup>th</sup> Cir. 2005).  
17 These exceptions are: (1) collateral legal consequences, (2) wrongs  
18 capable of petition yet evading review, (3) voluntary cessation by the  
19 defendant, and (4) class actions where the named party ceases to  
20 represent the class. *Id.* Mr. Howser does not allege that any of these  
21 exceptions apply, nor does this Court find them applicable in this  
22 case.<sup>1</sup> The Bankruptcy Code, which provides the statutory scheme

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23  
24       <sup>1</sup>This case does not involve a class action, nor does it  
25 involve voluntary cessation of allegedly illegal conduct. *In re*  
26 *Burrell*, 415 F.3d at 998. Also, the exception for "collateral  
legal consequences" is inapplicable. Mr. Howser is not suffering  
any legal consequences caused by the bankruptcy court's order  
since he has dismissed his bankruptcy petition in its entirety.

1 governing this appeal, is the proper starting point for determining  
 2 whether this appeal is moot.

3       1. The Bankruptcy Code and employment of counsel

4       Under ch. 11 of the Bankruptcy Code, a debtor-in-possession  
 5 ("DIP") retains control of the bankruptcy estate, and must manage it  
 6 for the benefit of the estate and the estate's creditors. *See In re*  
 7 *Smartworld Technologies, LLC*, 423 F.3d 166, 175 (2<sup>nd</sup> Cir. 2005). A DIP  
 8 occupies the same role as a bankruptcy trustee, and is entitled to all  
 9 the rights, powers, and duties of a trustee. 11 U.S.C. § 1107(a)  
 10 (2006). As trustee, a DIP may, with court approval, hire an attorney  
 11 to assist in carrying out the statutory duties of a trustee. *Id.* §  
 12 327(a). However, the attorney must not hold interests adverse to the  
 13 estate, and must be "disinterested." *Id.* While § 327(a) does not  
 14 expressly mention a DIP, it is applicable because of § 1107, which  
 15 places the DIP in the role of trustee. If the bankruptcy court finds  
 16 that the attorney fails to meet the requirements of § 327(a), it must  
 17 deny the application for employment. 11 U.S.C. § 327(a).

18       Conversely, under a ch. 7 petition for liquidation, the debtor  
 19 does not retain possession or control of the estate, and does not  
 20 assume the role of trustee. 11 U.S.C. §§ 541, 704. The ch. 7 debtor  
 21 can also retain counsel, but is not subject to approval by the court,  
 22 nor is the bankruptcy estate required to pay the ch. 7 debtor's  
 23 attorney's fees. 11 U.S.C. § 327(a) (limited by its terms to counsel  
 24 employed by a "trustee"); *Lamie v. U.S. Trustee*, 540 U.S. 526, 538-39

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25       See *Pub. Utils. Comm'n*, 100 F.3d at 1460. And finally, this case  
 26 does not involve a short lived injury that is "capable of  
 repetition, yet evade[s] review." *Id.*

1 (2004) (holding that in order for an attorney to receive compensation  
2 from estate funds, the attorney must be employed pursuant to § 327(a)).

3       2. Conversion from ch. 11 to ch. 7

4       The Bankruptcy Code allows a ch. 11 debtor to voluntarily convert  
5 his or her case to ch. 7. 11 U.S.C. § 1112(a) (2006). Lower federal  
6 courts have held that once conversion occurs, the original proceeding  
7 is terminated, as are all pending appeals from the original case. See,  
8 e.g., *In re Sasso*, 409 B.R. 251, 255 (1<sup>st</sup> Cir. B.A.P. 2009); *In re J.B.*  
9 *Lovell Corp.*, 876 F.2d 96, 99 (11<sup>th</sup> Cir. 1989) (holding that a voluntary  
10 conversion from ch. 7 to ch. 11 "obviates the need for further  
11 litigation of issues unique to Chapter 7."); *In re Roller*, 999 F.2d  
12 346, 347 (8<sup>th</sup> Cir. 1993). The Ninth Circuit also follows this approach,  
13 holding that an appeal from a terminated ch. 11 case must be dismissed  
14 as moot when the debtor converts to ch. 7 and closes the estate prior  
15 to appellate court review. *In re Cook*, 730 F.2d 1324, 1326 (9<sup>th</sup> Cir.  
16 1984). The Ninth Circuit's holding in *Cook* guides the resolution of  
17 this case.

18       Presently, Mr. Howser appeals an order entered by the Bankruptcy  
19 Court in a now-defunct ch. 11 proceeding. (Ct. Rec. 7). Also, he has  
20 since dismissed his ch. 7 case in its entirety. (Ct. Rec. 9 at 3).  
21 This conversion and subsequent dismissal rendered any appeal from the  
22 ch. 11 case moot. See *In re Cook*, 730 F.2d at 1326. Also, this Court  
23 is without jurisdiction because it cannot grant Mr. Howser adequate  
24 relief. *Pub. Utils. Comm'n of California v. Fed. Energy Reg. Comm'n*,  
25 100 F.3d 1451, 1458 (9<sup>th</sup> Cir. 1996). In the case at bar, the order that  
26 is being appealed was entered in the ch. 11 case, which requires the

1 Bankruptcy Court to approve the employment of an attorney hired to  
2 assist the trustee (or DIP). 11 U.S.C. § 327(a). However, under ch.  
3 7, the debtor is not required to seek court approval of counsel, nor is  
4 the estate responsible for paying the attorney's fees. 11 U.S.C. §  
5 327(a) (limited by its terms to a "trustees" employment of counsel).  
6 When Mr. Howser voluntarily converted his case to ch. 7, it removed  
7 this Court's ability to grant him effective relief in his ch. 11 case  
8 because he no longer needs court approval before hiring an attorney.  
9 See *In re Cook*, 730 F.2d at 1326. The record also indicates that there  
10 is no current bankruptcy proceeding: Mr. Howser has voluntarily  
11 dismissed his ch. 7 petition. (Ct. Rec. 9). Once the estate is  
12 closed, whether by discharge under another chapter or voluntarily, the  
13 possibility of granting adequate relief is foreclosed. See *In re Cook*,  
14 730 F.2d at 1326. Consequently, under Ninth Circuit case law, this  
15 Court has no jurisdiction over this moot appeal.

16 **B. Interlocutory Appeals**

17 Even if the Court concluded that this appeal was not moot, it  
18 would still dismiss this appeal as interlocutory. The Trustee's  
19 argument that an order denying employment of counsel is interlocutory,  
20 therefore depriving this Court of jurisdiction, is persuasive and well-  
21 founded. The Trustee relies on 28 U.S.C. § 158(a)(1), which states  
22 that the district courts "shall" have jurisdiction to hear appeals that  
23 are "from final judgments, orders and decrees." (Ct. Rec. 6). The  
24 Trustee further argues that the provisions of § 158(a)(3), which allows  
25 discretionary review of interlocutory orders, is inapplicable in this  
26 case because Mr. Howser did not seek the required leave of the Court.

1 (Ct. Rec. 6). The Trustee acknowledges that while Federal Rule of  
2 Bankruptcy Procedure 8003(c) allows this Court to construe Mr. Howser's  
3 notice of appeal as a motion for leave to appeal, it should not  
4 exercise discretionary review in this case. (Ct. Rec. 6). The Court  
5 agrees.

## 1. Procedure for Appealing a Bankruptcy Court order

7 Section 158(a) of title 28 gives district courts appellate  
8 jurisdiction over "final judgments, orders, and decrees" entered by a  
9 bankruptcy court. 28 U.S.C. § 158(a)(1). If the appellant is  
10 appealing an interlocutory order of the bankruptcy court, the appellant  
11 must seek leave from the district court prior to filing a motion to  
12 appeal an interlocutory order. 28 U.S.C. § 158(a)(3); Fed. R. Bankr.  
13 P. 8001(b). If the appellant does not seek the required leave, the  
14 district court may, in its discretion, construe the notice of appeal as  
15 the motion for leave to appeal. Fed. R. Bankr. P. 8003(c).

16 In the present case, Mr. Howser timely filed a notice of appeal  
17 with this Court on July 24, 2009. (Ct. Rec. 9). However, he did not  
18 file a motion for leave to appeal the interlocutory order, as required  
19 under § 158(a)(3). Thus, if the order denying employment is  
20 interlocutory, the Court is without jurisdiction, unless it views the  
21 notice as a motion for leave. This requires a determination of whether  
22 the order on appeal is interlocutory.

2. Orders Denying Employment Under 11 U.S.C. § 327(a) are Interlocutory.

Under Ninth Circuit case law, an order denying employment of  
counsel in a bankruptcy case is interlocutory. See *In re SS Retail  
Stores Corp.*, 162 F.3d 1230, 1232 (9<sup>th</sup> Cir. 1998) (citing *In re Westwood*

1 *Shake & Shingle, Inc.*, 971 F.2d 387, 389 (9<sup>th</sup> Cir. 1992)). These cases  
2 addressed the Ninth Circuit's jurisdiction over a district court's  
3 affirmance of bankruptcy court orders approving appointment of counsel.  
4 In *Westwood Shake*, the Ninth Circuit held that in order for it to have  
5 jurisdiction, the district court must have had jurisdiction as well.  
6 971 F.2d at 389. The Ninth Circuit recognized that even under the  
7 "flexible" standard for bankruptcy appeals, courts have consistently  
8 held that an order denying or granting employment is interlocutory.  
9 *Id.* Since the bankruptcy court order was interlocutory, the district  
10 court order affirming it was as well, and the Ninth Circuit dismissed  
11 the appeal. *Id.* at 391. This approach is also followed in other  
12 circuits. See *In re Devlieg, Inc.*, 56 F.3d 32, 34 (7<sup>th</sup> Cir. 1995); see  
13 also *In re Continental Investment Corp.*, 637 F.2d 1, 4 (1<sup>st</sup> Cir. 1980)  
14 (finding that order denying motion to disqualify counsel in bankruptcy  
15 case was not final). Thus, because the order denying employment is  
16 interlocutory, Mr. Howser has no right to appeal. His only possible  
17 relief is discretionary review under § 158(a)(3).

18 3. The issue presented in this case does not meet the standard  
for granting review of interlocutory orders.

19 Because neither the Bankruptcy Rules nor § 158(a)(3) provide a  
20 standard for a district court to apply when allowing interlocutory  
21 appeals, many district courts use the standard governing interlocutory  
22 appeals from district courts to circuit courts. *In re Zech*, 185 B.R.  
23 334, 336-37 (D. Neb. 1995). This standard requires a determination of  
24 (1) whether the issue involves a controlling issue of law, (2) whether  
25 there is substantial ground for difference of opinion on that issue of  
26 law, and (3) whether an immediate appeal will materially advance the

1 ultimate termination of the litigation. *Id.*; 28 U.S.C. § 1292(b)  
2 (2006). Granting leave to file interlocutory appeals is the exception,  
3 not the rule, and should only be granted in extraordinary  
4 circumstances. *In re Zech*, 185 B.R. at 337. "Indeed, because  
5 interlocutory appeals interfere with the cumulative goal of the  
6 bankruptcy system . . . they are not favored." *Id.* (citing *In re Kroh*  
7 *Bros. Dev. Co.*, 101 B.R. 1000, 1007 (W.D. Mo. 1989)).

8 In this case, there is no "substantial ground for difference of  
9 opinion" because the Bankruptcy Court merely applied the express terms  
10 of the statute. 11 U.S.C. § 327(a). The Bankruptcy Court is mandated  
11 to deny employment of counsel that is not disinterested. *Id.* There is  
12 no room for differing opinions on this issue. Also, extraordinary  
13 circumstances do not exist in this case that warrant review of this  
14 interlocutory order. Finally, granting review of this appeal will not  
15 benefit the expeditious termination of this litigation because it has  
16 already been terminated. Mr. Howser's appeal is interlocutory, and  
17 discretionary review of the order is inappropriate. Accordingly, even  
18 if the Court found that this appeal was not moot, the Court would still  
19 dismiss Mr. Howser's appeal for lack of jurisdiction over an  
20 interlocutory appeal.

21 **C. Consolidation of Appeals Argument**

22 Mr. Howser attempts to avoid the dismissal of his appeal by  
23 arguing that he has consolidated this appeal ("First Appeal"), with  
24 another appeal from an order denying compensation to his lawyers  
25 ("Second Appeal"), which is "final and appealable." (Ct. Rec. 9).  
26 Mr. Howser argues that this removes any jurisdictional defect in the

1 First Appeal. He states in his response brief that he has filed a  
2 Motion to Consolidate Appeals. (Ct. Rec. 9). The Record does not show  
3 that this motion has been filed, nor does Mr. Howser's argument  
4 persuade the Court.

5 Mr. Howser relies solely on one case from the Eleventh Circuit as  
6 support for his contention that consolidating appeals makes the  
7 jurisdictional question in the First Appeal moot. (Ct. Rec. 9). That  
8 case, *Nicholson v. Shafe*, dealt with simultaneous proceedings in both  
9 state and federal court. 558 F.3d 1266, 1268 (11<sup>th</sup> Cir. 2009). On  
10 March 25, 2008, a federal district court ordered the appellants to pay  
11 an undetermined amount of attorney's fees. *Id.* at 1270. The next day,  
12 the appellants appealed to the Eleventh Circuit. *Id.* The Eleventh  
13 Circuit questioned its jurisdiction based on whether the order awarding  
14 unspecified fees was "final and appealable." *Id.* On May 14, 2008, the  
15 district court quantified the amount of attorney's fees. *Id.* The  
16 appellants then filed another notice of appeal as to that final order.  
17 *Id.* The appellants also filed a motion to consolidate the two appeals.  
18 *Id.* The Eleventh Circuit held that because the appellants appealed the  
19 final order of fees, and consolidated it with the appeal of the first  
20 order, any jurisdictional question regarding the first appeal was  
21 "moot." *Id.* This was because the Eleventh Circuit's question  
22 regarding the propriety of reviewing an order of unspecified fees was  
23 mooted when the district court quantified the fees. See *id.*

24 The holding in *Nicholson* does not benefit Mr. Howser because in  
25 that case, the two appeals addressed the same issue (amount of  
26 attorney's fees). Here, they do not. One appeal addresses the

1 Bankruptcy Court's denial of employment, while the other addresses its  
2 denial of fees. Also, Nicholson does not stand for the proposition  
3 that consolidation of appeals can remedy any jurisdictional defect. It  
4 merely states that once the fees were quantified, the jurisdictional  
5 question regarding the review of an unspecified fee award was moot.  
6 *Id.* Also, consolidating appeals does not create Article III  
7 jurisdiction when the entire case is moot due to voluntary dismissal.  
8 As stated earlier, a federal court only has jurisdiction over "cases  
9 and controversies." U.S. Const. art. III, § 2, cl. 2. As Mr. Howser  
10 has dismissed his bankruptcy proceeding, there is no case or  
11 controversy, and this Court cannot grant Mr. Howser adequate relief.  
12 This case is moot, and the consolidation of appeals, whether it occurs  
13 or not, will not revive the issues and confer jurisdiction on this  
14 Court.

15 **CONCLUSION**

16 The Court, being fully advised, **HEREBY ORDERS** the U.S. Trustee's  
17 Motion to Dismiss Appeal (**Ct. Rec. 6**) is **GRANTED**. This action is  
18 **dismissed with prejudice**.

19 **IT IS SO ORDERED.** The District Court Executive is hereby directed  
20 to enter this order, provide copies to counsel, **enter judgment in favor**  
21 **of Appellee** and **CLOSE THE FILE**.

22 **DATED** this 17th day of February, 2010.

23 \_\_\_\_\_  
24 S/Fred Van Sickle  
25 Fred Van Sickle  
26 Senior United States District Judge